

HONORABLE ROBERT S. LASNIK

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DIRK WALTER TICHGELAAR,

Defendant.

Cause No. 21-114 RSL
Cause No. 21-115 RSL

**DEFENDANT'S AMENDED
SENTENCING
MEMORANDUM**

Defendant, Dirk Walter Tichgelaar, by and through his Attorney, Gilbert H. Levy, respectfully submits the following memorandum in supporting his positions at sentencing:

I. SENTENCING RECOMMENDATION

Defendant's Counsel recommends a sentence of 10 years on Count 1, and 5 years on Count 2, with the sentences to run concurrently. The Court is requested to

1 recommend placement at FCI Seagoville, so that the Defendant can participate in
 2 the sex offender therapy program offered at that facility.

3 II. UNRESOLVED OBJECTIONS TO THE PSR

4 A. The Defendant's Prior Oregon Conviction Does Not Qualify for 5 Enhancement of the Penalties Under Title 18 U.S.C. 2252A(b)(2)

6 In 2005, the Defendant was convicted of two counts of violating O.R.S. §
 7 163.427 which provides:

8 (1) A person commits the crime of sexual abuse in the first degree when that
 9 person:

10 (a) Subjects another person to sexual contact and:

11 (A) The victim is less than 14 years of age;

12 (B) The victim is subjected to forcible compulsion by the actor; or

13 (C) The victim is incapable of consent by reason of being mentally
 14 incapacitated, physically helpless or incapable of appraising the nature of the
 15 victim's conduct; or

16 (b) Intentionally causes a person under 18 years of age to touch or contact
 17 the mouth, anus or sex organs of an animal for the purpose of arousing or
 18 gratifying the sexual desire of a person.

19 (2) Sexual abuse in the first degree is a Class B felony.

20 Title 18 United States Code Section 2252A(b)(2) provides:

21 Whoever violates, or attempts or conspires to violate, subsection (a)(5) shall
 22 be fined under this title or imprisoned not more than 10 years, or both, but, if
 23 any image of child pornography involved in the offense involved a
 prepubescent minor or a minor who had not attained 12 years of age, such
 person shall be fined under this title and imprisoned for not more than 20
 years, or if such person has a prior conviction under this chapter, chapter 71,
 chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of
 the Uniform Code of Military Justice), **or under the laws of any State
 relating to aggravated sexual abuse, sexual abuse, or abusive sexual
 conduct involving a minor or ward, or the production, possession,**

1 **receipt, mailing, sale, distribution, shipment, or transportation of child**
 2 **pornography, such person shall be fined under this title and imprisoned**
 3 **for not less than 10 years nor more than 20 years.** (Emphasis supplied).

4 To determine whether a prior State conviction qualifies for the sentence
 5 enhancement under § 2252A(b)(2) a court must apply the categorical approach.
 6 Under the categorical approach, the court first defines the federal generic definition
 7 of the crime and then compares it to the elements of the State offense. *Taylor v.*
 8 *United States*, 495 U.S. 595, 110 S. Ct. 2143 (1990), *United States v. Sullivan*, 797
 9 F.3d 623, 635 (9th Cir. 2015). If the State conviction criminalizes the same or less
 10 conduct, then it is a categorical match. *Id.* But where the state conviction
 11 criminalizes more conduct than the federal generic offense, it does not qualify as a
 12 categorical match. *Id.* The categorical approach looks only to the statutory
 13 definition of the prior State offense and does not consider the underlying facts. *Id.*

15 If the State conviction contains one indivisible set of elements, then that
 16 ends the inquiry. *Deschamps v. United States*, 570 U.S. 254, 260 133S. Ct. 2276,
 17 2283 (2013). However, when a statute lists potential elements in the alternative,
 18 then the court applies a modified categorical approach. *Id.* at 264. Under that
 19 approach, the court looks at a limited set of documents such as the indictment, plea
 20 agreement and judgment to determine which set of elements formed the basis of
 21

1 the conviction. *Id.* at 265. The Court then compares the elements of applicable
 2 subsection of the State statute to the generic federal offense. *Id.* at 263.

3 With certain statutes, the phrase “relating to” has a broadening effect on the
 4 analysis. *United States v. Sullivan, supra*, at 638-641. The court may look beyond
 5 the elements of the crime to determine whether the harm caused to the victim by
 6 the State crime is comparable to the harm caused by a violation of the generic
 7 federal offense. *Id.* However, the *Sullivan* analysis does not apply where the text
 8 and history of the statute require a narrower construction. In the case of child
 9 pornography statutes, where terms are defined, the words “relating to” have a
 10 much narrower meaning. *United States Reinhart*, 893 F. 3d 606, 614 (9th Cir. 2018)
 11 and see also *United States v. Hudson*, 986 F. 3d 1201, 1213 (9th Cir. 2021). The
 12 Court does not depart from the elements based, categorial approach to determine
 13 whether a prior State offense “relates to” child pornography. *Reinhart* at 615. The
 14 federal generic offense is determined by reference to the statutory definition of
 15 child pornography and the analysis consists of comparing the elements of the State
 16 crime to the definitions in the federal statute. *Id.* at 616-618.

17 The definition of “child pornography” is found in Title 18 United States
 18 Code § 2256(8). It provides in part:

19 “child pornography” means any visual depiction, including any photograph,
 20 film, video, picture, or computer or computer-generated image or picture,
 21

whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where--
 (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;

In this case, O.R.S. 163.427 is divisible since it sets forth elements in the disjunctive. Thus, the crime of conviction is determined by reference to the modified categorical approach. According to the indictment and the plea agreement, the Defendant pleaded guilty to having sexual contact with an individual less than 14 years of age.¹ Thus, the State crime for purposes of comparison is set forth in subsection (1)(a)(A). That crime does not involve a “visual depiction” ...of a “minor engaging in sexually explicit conduct”. Therefore the Defendant’s State conviction is not a categorical match and does not qualify for an enhancement under 18 U.S.C. 2252A(b)(2).²

B. Defendant Objects to the Five Level Upward Adjustment for “Pattern of Activity” under USSG 2G2.2(b)(5)

On Count 2, the Defendant received a five-level upward adjustment in his base offense level based on his having engaged in a “pattern of activity involving the sexual abuse and sexual exploitation of a minor”. See PSR Paragraph 37 and USSG § 2G2.2(b)(5). The application note defines “pattern of activity” as:

¹ A copy of the Oregon indictment, plea agreement and judgment are attached hereto as exhibits.

² A similar analysis was employed in *United States v. Schopp*, 938 F.3d 1053 (9th Cir. 2019). In that case the defendant was charged with production of child pornography. The Court held that the defendant’s State sex offenses

...any combination of two or more instances of the sexual abuse or sexual exploitation of a minor by the defendant, whether or not the abuse or exploitation (A) occurred during the course of the offense; or (B) involved the same minor; or (C) resulted in a conviction for such conduct.

The application note defines “sexual abuse or exploitation as”:

“Sexual abuse or exploitation” means any of the following: (A) conduct described in 18 U.S.C. § 2241, § 2242, § 2243, § 2251(a)-(c), § 2251(d)(1)(B), § 2251A, § 2260(b), § 2421, § 2422, or § 2423; (B) an offense under state law, **that would have been an offense under any such section if the offense had occurred within the special maritime or territorial jurisdiction of the United States**; or (C) an attempt or conspiracy to commit any of the offenses under subdivisions (A) or (B). “Sexual abuse or exploitation” **does not include possession, accessing with intent to view, receipt, or trafficking in material relating to the sexual abuse or exploitation of a minor.** (Emphasis supplied).

According to the above definitions, the pattern must consist of two convictions other than a conviction for possession of child pornography. In this case, the “pattern” can only consist of the conviction in Count 1 and the prior Oregon conviction. However, the prior Oregon conviction does not contain elements that fit within the elements of the generic federal crime. See *Taylor v. United States*, 495 U.S. 595, 110 S. Ct. 2143 (1990).³ For crimes involving sex with a minor, the elements the generic federal offense are: (1) a *mens rea* of knowingly; (2) a sexual act; (3) with a minor between 12 and 16; (4) age difference

involving minors did not qualify for sentence enhancement under the categorical approach because they did not involve production of child pornography.

³ In *United States v. Dahl*, 833 F. 3d 345 (8th Cir. 2021) the Court applied the categorical approach to determine whether prior convictions constituted a pattern of activity under USSG § 4B1.5(b).

1 of at least four years. *United States v. Sullivan, supra*, at 637. The Oregon statute
 2 does not contain a *mens rea* requirement nor does it contain a requirement that the
 3 victim be four years younger than the perpetrator. Because the Oregon statute
 4 proscribes more conduct than the generic federal crime, there is no “pattern of
 5 activity” within the meaning of USSG § 2G2.2(5).⁴

7 C. The Defendant Objects to the Two Level Upward Adjustent for Use of a
 8 Computer.

9 The PSR awarded the Defendant a two-level upward adjustment for use of a
 10 computer. See, PSR, Paragraph 38. Enhancements are intended to capture facts of
 11 an individual offense that make it more egregious than the ordinary offense. In an
 12 age of ubiquitous computers, most child pornography possession offenses involve
 13 computers. The United Sentencing Commission Reports that the adjustment was
 14 applied in 94.2% of cases in 2022.⁵ The Cours should reject this adjustment.
 15 However, if the Court determines that it applies, it should consider a downward
 16 variance.
 17

18 **III. 18 U.S.C. § 3553 FACTORS**

19
 20 ⁴ The subtraction of five points affects the calculation under the grouping rule of USSG § 3D1.4. See
 21 PSR, Paragraph 44. Defendant maintains that the adjusted offense lever for Count 2 is 33 rather than 38.
 22 Since the offense level for Count 2 is 5 to 8 levels less serious than the highest offense level, it results in
 one-half unit rather than one. See § 3D1.4(a). This means that the combined offense level is increased
 one level rather than two as calculated in the PSR. The Combined Offense Level is 41 rather than 42 as
 calculated in the PSR.

23 ⁵ https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline=application-frequencies/USE_of_SOC_Guidelines_Based.pdf, at 43.

1 A. Nature and Circumstances of the Offense

2 In 2020, the Defendant began chatting on-line with an HSI agent posing as
3 the parent of a five-year-old daughter. The agent represented that the daughter was
4 available for sex. The Defendant traveled from Oregon to Washinton with the
5 ostensible purpose of having sex with the minor. He was arrested when he arrived
6 at the meeting place. Agents found a dress for the minor that he had in his
7 possession and some kind of lubricant in his pocket. Following the arrest, agents
8 obtained a search warrant for the Defendant's computer and found a cache of child
9 pornography. Following his arrest, the Defenant asked a family member to delete
10 the contents of the computer.
11

12 B. History and Characteristics of the Defendant

13 The Defendant's letter to the Court and supporting letters are attached hereto
14 as exhibits.
15

16 The Defendant has prior convictions for robbery, assault, and having a
17 sexual relationship with a minor under the age of 14. The Defendant was 21 at the
18 time of that relationship. He has no criminal history as a juvenile and no other
19 arrests or convictions involving sex offenses.
20

21 The Defendant's father was an abusive alcoholic. The Defendant was the
22 sole caretaker after his father had a stroke. The Defendant was close to his mother,
23

1 but his father was emotionally distant. The Defendant has an ACES score of 7 out
2 of a possible 10. Both parents died while the Defendant was in prison. The
3 Defendant was close to his mother and blames himself for her death. He attempted
4 to visit her during her last days but was prevented from doing so by prison
5 authorities. Although he was unable to see his mother, he was the one who made
6 the decision to turn off her life support.
7

8 The Defendant never married and has no children. The relationship that he
9 had with the minor was consensual at least in his mind. It appears that he may
10 have had only one brief in person relationship with an adult female. After his
11 release from prison, he had a four-year online relationship with someone who he
12 believed to be an adult female. The online relationship ended when the person
13 abruptly stopped communicating. The Defendant was deeply affected by the loss.
14 The Defenant suffers from severe depression, which is possibly brought on by the
15 abuse he suffered as a child.⁶ The Defendant took a polygraph and was asked
16 whether he engaged in sex acts with minors following his release from prison. His
17 answer in the negative was determined to be truthful.
18
19

20 The Defendant has been at the Federal Detention Center for nearly four
21 years awaiting final disposition of his case. During that time, he experienced
22

23 ⁶ The psychological report of Dr. James Manley is included herewith as an exhibit, filed under seal.

1 COVID-19 lockdown and a bout with COVID-19. He suffers from a torn Achilles
2 tendon that remains untreated.

3 C. Need to Reflect Seriousness of the Offense, Promote Respect for Law,
4 and Provide Just Punishment

5 The offenses herein are undoubtedly among the most serious. However, the
6 30-year sentence recommended by the Government and the 20-year sentence
7 recommended by probation are disproportionate to the severity of the crime. A
8 disproportionate sentence is unjust and fails to promote respect for the law.
9

10 D. Need to Afford Adequate Deterrence

11 The Defendant is more likely to be deterred if he takes advantage of the sex
12 offender treatment offered by the Bureau of Prisons. He is more likely to be
13 motivated to seek treatment if he has some hope of a life after prison.
14

15 E. Need to Protect the Public

16 According to Dr. Manley, the Defendant presents a low risk of re-offense.
17 This is supported by the statistical analysis contained in his report.

18 F. Need to Provide the Defendant with Medical or Correctional Treatment

19 The Bureau of Prisons offers a therapy program for sex offenders. The
20 program does not offer a time cut and participation is voluntary.
21

22 G. Need to Avoid Unwarranted Sentence Disparity
23

1 Cases of similar severity have resulted in sentences less severe than the
 2 terms recommended by the Government and Probation. In *United States v.*
 3 *McGowan*, Case No CR17-701 RSM, Judge Martinez imposed a sentence of 160
 4 months in a child pornography case where the defendant had prior convictions for
 5 homicide, assault, and child pornography possession. In *United States v. Rickdal*,
 6 CR 16-334 JLR, Judge Robart imposed a 144-month sentence for an under-cover
 7 sting operation involving enticement of minors. The Defendant in that case had
 8 prior convictions for attempted child molestation, child pornography and was on
 9 supervision when he committed the instant offense.
 10
 11

12 In cases where more severe sentences have been imposed, the conduct was
 13 typically more egregious than that involved in this case. In *United States v.*
 14 *Wilkins*, CR 19-063 JCC, Judge Coughenour imposed a 300-month sentence
 15 concurrent with a multi state rape of a child case and where Defendant was
 16 convicted of enticement, child pornography and travel with intent to engage in sex
 17 with a minor. In *United States v. McCoy*, CR 16-284-JLR, Judge Robart imposed
 18 a 24-year sentence for production, receipt, and distribution of child pornography.
 19 In *United States v. Gordon*, CR 15-246-RAJ, Judge Jones imposed a sentence of
 20 293 months in a production case involving multiple victims, In *United States v.*
 21 *Delay*, CR 15-175, this Court imposed a 35-year sentence in a case involving
 22
 23

1 enticement of minors to engage in prostitution, rape of a minor, and production of
 2 images involving sexual abuse of a minor.

3 IV. CONCLUSION

4 In enticement cases, the undercover officer provides the opportunity for the
 5 crime, which otherwise may not have occurred. This distinguishes it from predator
 6 cases, like those which are cited above. This is the reason why the
 7 recommendations of the Government and Probation are disproportionate to the
 8 seriousness of the offense. The Defendant may not have committed Count 1 had
 9 the opportunity not been provided. He had no recent history of predatory behavior
 10 preceding the instant offense. The Court is respectfully requested to impose the
 11 sentence recommended above.
 12

13 Pursuant to the Local Rule, I certify that this brief contains 2,617 words.

14 DATED: March 12, 2024.

15
16
17
18 /s/Gilbert H. Levy

19 Gilbert H. Levy, WSBA #4805
 20 Attorney for Defendant
 21
 22
 23

CERTIFICATE OF SERVICE

I certify that on March 12, 2024, I caused to be electronically filed the foregoing document with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the attorney(s) of record.

/s/Gilbert H. Levy
Gilbert H. Levy, WSBA #4805
Attorney for Defendant